Guideline Sentencing Update

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Determining the Sentence

"Safety Valve" Provision

Third Circuit holds that defendant possessed firearm during relevant conduct and thus cannot qualify for safety valve. Defendant pled guilty to one count of possession with intent to distribute over 50 grams of cocaine base. He was arrested while selling crack on the street in September 1994. The evidence indicated that he regularly sold drugs during the preceding year and, at least in May and June of that year, purchased several guns in connection with his drug dealing. To qualify for the safety valve reduction, a defendant cannot "possess a firearm . . . in connection with the offense." 18 U.S.C. § 3553(f)(2); USSG § 5C1.2(2). Application Note 3 of § 5C1.2 states that "offense" in subdivision (2) means "the offense of conviction and all relevant conduct." The district court held that defendant possessed a firearm in connection with the offense as defined in Note 3 and declined to apply the safety valve provision.

The appellate court affirmed. "The record shows that Wilson's drug dealing activities in the year preceding his arrest fit within the definition of 'same course of conduct.' By his own admission, he was regularly engaged in drug sales for the year prior to his September arrest, satisfying both the 'regularity' and 'temporal proximity' tests for determining 'same course of conduct.' . . . [Also], the record has demonstrated that Wilson has dealt drugs, and cocaine in particular, both when he was in possession of firearms and in connection with the offense of conviction. Wilson's admission of prior drug dealing, the reputation evidence and the circumstances surrounding his September arrest are sufficient to satisfy the similarity prong."

"We conclude from this course of conduct that Wilson's prior drug dealing was relevant conduct to the offense of conviction . . . for the purposes of the Relevant Conduct and Safety Valve Provisions." The court then found that defendant's "involvement with firearms is integrally connected to his prior drug dealing," and therefore he "failed to meet one of the requirements of the Safety Valve Provision."

U.S. v. Wilson, 106 F.3d 1140, 1144–45 (3d Cir. 1997). *See also U.S. v. Plunkett*, 125 F.3d 873, 874–75 (D.C. Cir. 1997) (affirmed: safety valve did not apply to defendant who, although he had no weapon during single drug transaction that was basis of offense of conviction, admittedly possessed firearm during relevant conduct).

See *Outline* generally at V.F

Eighth Circuit holds that defendant, not a coconspirator, must possess weapon to preclude safety valve. Defendant pled guilty to drug conspiracy charges, plus a charge of using and carrying a firearm in relation to a drug-trafficking crime. The basis for the firearm charge was that defendant knew his coconspirator carried a weapon during the conspiracy. At sentencing, the district court ruled that defendant was ineligible for the safety valve reduction because of the coconspirator's possession. The safety valve provision requires that a defendant did not "possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." 18 U.S.C. § 3553(f)(2); USSG § 5C1.2(2).

The appellate court remanded. Note 4 to § 5C1.2(2) "provides that '[c]onsistent with [U.S.S.G.] § 1B1.3 (Relevant Conduct),' the use of the term 'defendant' in § 5C1.2(2) 'limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.' . . . This language mirrors § 1B1.3(a)(1)(A). Of import is the fact that this language omits the text of § 1B1.3(a)(1)(B) which provides that 'relevant conduct' encompasses acts and omissions undertaken in a 'jointly undertaken criminal activity,' *e.g.* a conspiracy." Therefore, "we conclude that in determining a defendant's eligibility for the safety valve, § 5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators. As it was Wilson's co-conspirator, and not Wilson himself, who possessed the gun in the conspiracy, the district court erred in concluding that Wilson was ineligible to receive the benefit of § 5C1.2."

U.S. v. Wilson, 105 F.3d 219, 222 (5th Cir. 1997) (per curiam). *Accord In re Sealed Case*, 105 F.3d 1460, 1461–65 (D.C. Cir. 1997) [9 *GSU* #3]. *But see U.S. v. Hallum*, 103 F.3d 87, 89–90 (10th Cir. 1996) (proper to deny safety valve for codefendant's possession of weapon) [9 *GSU* #3].

See *Outline* generally at V.F

Ninth Circuit holds that safety valve provision does not allow departure to probation when statute of conviction prohibits probation sentence. Defendant faced a ten-year statutory minimum sentence, but qualified for the safety valve provision. In addition to sentencing below the mandatory minimum, the district court sua sponte departed below the guideline range to impose a sentence of probation. The government appealed, and the appellate court remanded for resentencing. Apart from finding that the departure itself—for aberrant be-

havior—was not justified, the court held that the government was entitled to notice that the district court planned to depart on a ground that was not raised by either party or the presentence report. See other cases in *Outline* at VI.G and *U.S. v. Pankhurst*, 118 F.3d 345, 357 (5th Cir. 1997) (remanded: "notice must be given to the Government before a district court may depart downward").

The court also held that a sentence of probation was illegal in this case. Defendant was convicted of violating 21 U.S.C. §841(a)(1). Section 841(b), which required the ten-year minimum sentence for defendant, states that "notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph." Defendant argued that the safety valve, 18 U.S.C. §3553(f), which also contains "notwithstanding any other provision of law" language, "trumps" §841(b)'s prohibition, but the court disagreed. "To suggest that a court can disregard both the minimum sentence and the probation ban would render the ban on probation in §841 entirely meaningless, since every time a court avoided the 10-year minimum, it could also disregard the probation ban. Construing §841(b) to give effect to every provision, it appears that §841 establishes the probation ban as the ultimate floor in case the mandatory minimum sentence is somehow avoided. We therefore hold that the 'notwithstanding any other provision of law' language in §3553(f) is tied only to the ability to disregard statutory minimum terms of imprisonment; any other reading would eviscerate this ultimate floor in §841."

The court also noted that "the Guidelines *themselves* clarify that a sentence of probation is impermissible for the crime committed by Green. First, probation is prohibited under the Guidelines for any 'Class A' felony, which is defined [as carrying] a maximum term of life imprisonment. . . . U.S.S.G. §5B1.1(b)(1)." Defendant was convicted of such a felony. "Second, the Sentencing Guidelines also expressly incorporate the probation ban in statutes such as §841(b), by prohibiting probation in the event that the offense of conviction expressly precludes probation as a sentence. . . . U.S.S.G. §5B1.1(b)(2)."

U.S. v. Green, 105 F.3d 1321, 1323–24 (9th Cir. 1997).

See *Outline* at VI.G, generally at V.F

Departures

Mitigating Circumstances

Ninth Circuit affirms departure based on prejudice to defendant from government conduct during plea negotiations. Defendant was indicted on cocaine and heroin distribution charges. "The district court originally dismissed the five-count indictment, finding that the government had engaged in misconduct by entering into plea negotiations with Lopez in the absence of his attorney. This court reversed the dismissal, determining it to be an inappropriate remedy." Defendant was then convicted at a jury trial, and "the district court sentenced Lopez to 135 months in custody. In imposing this sentence, the district court departed downward three levels because of the prejudice to Lopez which resulted from the government's conduct."

The appellate court affirmed. "The government appeals what it characterizes as the district court's three-level downward departure for governmental misconduct. A reading of the sentencing transcript makes clear, however, that the district court assumed it could not depart downward for governmental misconduct. . . . Rather, it instituted a downward departure due to prejudice Lopez suffered as a result of the government's conduct. . . . Lopez's opportunity for full and fair plea negotiations was seriously affected. The district court noted that 'although it cannot be determined what the result of those negotiations might have been, it is clear that he reasonably believed he had no choice but to go to trial.' . . . The prejudice Lopez encountered as a direct result of the government's conduct was, in our view, significant enough to take this case out of the heartland of the Guidelines. . . . Therefore, the district court's three-level departure was not an abuse of discretion."

U.S. v. Lopez, 106 F.3d 309, 311 (9th Cir. 1997).

See *Outline* at VI.C.4.c

Eighth Circuit establishes analysis for aberrant behavior departure after *Koon*. Defendant pled guilty to participating in a drug manufacturing conspiracy. The district court granted a downward sentencing departure under §5K2.0 for aberrant behavior. The government appealed, arguing that defendant's conduct was not a "single act" of aberrant behavior. The appellate court, concluding that "this is no longer the most relevant inquiry," remanded and discussed departures in light of *Koon v. U.S.*, 116 S. Ct. 2035 (1996), and how it affects the analysis of whether to depart for aberrant behavior.

Under *Koon*, "a court of appeals need not defer to the district court's determination of an issue of law, such as 'whether a factor is a permissible basis for departure under any circumstances.' But the district court is entitled to deference on most departure issues, including the critical issues of '[w]hether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way.'"

"On this appeal, the parties primarily debate whether Kalb's offense was a 'single act of aberrant behavior' as that term has been defined in prior Eighth Circuit departure cases. . . . However, . . . our prior cases, and the district court in this case, have not accurately anticipated the *Koon*-mandated mode of analysis in a number of significant respects."

"First, the Sentencing Commission only mentioned 'single acts of aberrant behavior' in discussing probation and split sentences. Thus, it is an *encouraged* factor only when considering crimes in which the offender might be eligible, with a departure, for those modest forms of punishment. . . . Under *Koon*, for a serious crime like Kalb's that cannot warrant probation, a 'single act of aberrant behavior' is an unmentioned, not an encouraged departure factor."

"Second, our prior cases suggest that the only 'aberrant behavior' which may be *considered* for departure purposes is the 'single act of aberrant behavior' mentioned in the introductory comment about probation and split sentences. . . . The Commission's introductory comment about single acts of aberrant behavior does not appear in its general discussion of departures. . . . Thus, under *Koon*, 'aberrant behavior' in general is an unmentioned factor, and the task for the sentencing court is to analyze how and why specific conduct is allegedly aberrant, and whether the Guidelines adequately take into account aspects of defendant's conduct that are in fact aberrant."

"Third, when dealing with an unmentioned potential departure factor such as alleged aberrant behavior, *Koon* instructs the sentencing court to consider the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.' . . . In this case, we cannot tell from the sentencing record what aspects of Kalb's behavior the district court considered 'aberrant,' and why that particular kind of aberrant behavior falls outside the heartland *of the guidelines applicable in determining Kalb's sentencing range*. For example, the court stated that Kalb's shipping of six gallons of a precursor chemical was a single aberrant act, but it did not compare this single act to those of other peripheral drug conspirators, such as cocaine and heroin couriers."

U.S. v. Kalb, 105 F.3d 426, 428–30 (8th Cir. 1997) (Bright, J., dissenting).

See *Outline* at VI.C.1.c

Aggravating Circumstances

Sixth Circuit holds that potential dangerousness of defendant with mental disease did not warrant upward departure. Defendant was convicted of four federal firearms offenses in 1991. Before sentencing, the government moved for a hearing under 18 U.S.C. § 4244 to determine his mental condition. Following § 4244(d), the court found that defendant "is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment."

During defendant's treatment, doctors found a new medication that improved his condition enough to warrant a "Certificate of Recovery and Request for Court to Proceed with Final Sentencing" in 1995. The certificate also recommended that, after sentencing, defendant be returned to the institution for proceedings under § 4246, "Hospitalization of a person due for release but suffering from mental disease or defect." This recommendation was made because the time defendant had spent at the institution was longer than his sentence would be and so, after sentencing, he would be released; there was no assurance that he would continue his medication without further supervision; and, without the medication, he could pose a danger to others.

Defendant's guideline range was 12–18 months, but the court "ruled that the danger Moses posed to the community warranted an upward departure to a sentence of 120 months 'primarily on the basis of Section 5K2.14, but alternatively on the ground of Section 5K 2.0 . . . .'"

The appellate court held that the departure was invalid. Under § 5K2.14 ("national security, public health, or safety was significantly endangered"), the sentencing court is required "to look at the offense committed and the dangerousness of the defendant *at the time of the crime*, not the future dangerousness of the defendant." However, "it is evident . . . that the district court, legitimately concerned about the prospects that Moses would discontinue Clozaril, was focusing on Moses' future dangerousness when it applied § 5K2.14. That was legal error." The court also found that § 5H1.3 ("[m]ental and emotional conditions are not ordinarily relevant" in departure decisions) applied here and precluded departure. "Section 5H1.3 by its terms must encompass a variety of mental illnesses, including many that might make a defendant dangerous to himself and others. Moses' paranoid schizophrenia made him dangerous at the time of his crime, but not in an uncommon way, or in a way so out of the ordinary (in the context of mentally ill criminals) as to override application of the rule."

The court also rejected § 5K2.0 as a basis for departure. A defendant's need for treatment does not warrant departure, the court held. And, as noted above, "we do not believe that Moses' dangerousness makes this is an 'extraordinary case.'" The court then disagreed with *U.S. v. Hines*, 26 F.3d 1469, 1477 (9th Cir. 1994) (defendant's "extremely dangerous mental state" and the "significant likelihood he will commit additional serious crimes" warranted upward departure under § 5K2.0 and § 4A1.3). Danger resulting from mental illness cannot justify departure "when there exists a statute, 18 U.S.C. § 4246, directly designed to forestall such danger through continued commitment . . . . Otherwise, virtually every criminal defendant who, at the time of sentencing, met the dangerousness criteria of § 4246 would also be subject to an upward departure. . . . [W]e hold that under the relevant statutes and guidelines, the appropriate mechanism of public protection is a commitment proceeding under § 4246, rather than an extended criminal sentence."

U.S. v. Moses, 106 F.3d 1273, 1277–81 (6th Cir. 1997).

See *Outline* at VI.B.2.c

Offense Conduct

Calculating Weight of Drugs

Second Circuit holds that "not reasonably capable of providing" exception to using agreed-upon amount is not applicable to buyer in reverse sting. Defendant agreed to pay $11,000 for 125 grams of heroin from undercover agents. When arrested at the time the buy was to occur, defendant had only $2,039. The district court based the sentence on the agreed-upon 125 grams of heroin. On appeal, defendant conceded he had agreed to buy 125 grams but argued that, following Application Note 12 of § 2D1.1, his sentence should be based on the amount that $2,039 would buy because he was financially incapable of purchasing 125 grams.

Note 12 states, in relevant part: "In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. . . . In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing."

The appellate court concluded that "[t]he plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is *selling* the controlled substance, that is, where the defendant '*provid[es]* the agreed-upon quantity of the controlled substance.' (emphasis added) It is hard to believe that the narrowness of this language is inadvertent, coming immediately after a discussion of what happens in a reverse sting, where the government agent 'provides' the controlled substance and the defendant provides only the money to purchase it. Moreover, in a reverse sting, as the government points out, drug traffickers making an illegal purchase frequently hold purchase money in reserve nearby for ready access while they test the quality of the drugs being purchased. We note also that drugs have been delivered on consignment, . . . or on credit with a down payment . . . . These possibilities lend support to the logic of the Sentencing Commission's distinction." Because the "not reasonably capable" exception does not apply to buyers, "[t]he district court correctly calculated Santos' sentence on the basis of 125 grams of heroin, which was the agreed-upon amount in this transaction."

U.S. v. Gomez, 103 F.3d 249, 253–54 (2d Cir. 1997).

See *Outline* at II.B.4.d

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